Supreme Court, U.S.
FILED
MAR 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1517

In the Supreme Court of the United States

OCTOBER TERM, 1987

ST. JOHNS COUNTY, FLORIDA,
Petitioner,

v.

SYLVESTER LUCAS,
Respondent,

and

FRANCIS O'LOUGHLIN, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a county, through its governing body, can be held strictly liable under 42 U.S.C. § 1983 for the unconstitutional act of the county sheriff in discharging one of his deputies, where the county took no official action and delegated no policy-making authority which resulted in the constitutional wrong, and where the county had no power under state law to reverse the sheriff's action.

2. Whether a county, through its governing body, can be held strictly liable under 42 U.S.C. § 1983 for the unconstitutional act of the county sheriff in discharging one of his deputies, where the sheriff, as an independent constitutional officer, derives his policy-making authority exclusively from state law and not an act of delegation on the part of the county.

PARTIES TO PROCEEDING IN COURT BELOW

The petitioner in this proceeding is St. Johns County, Florida, through its Board of County Commissioners. The County was a defendant in the court below. The principal respondent is Sylvester Lucas, plaintiff below, a former deputy sheriff for the St. Johns County Sheriff's Office. Additional respondents are Francis O'Loughlin, former sheriff for St. Johns County and Ronald Janson, a former captain for the St. Johns County Sheriff's Office, both of whom were defendants below.

TABLE OF CONTENTS

Page

Questions Presented for Review.....i
Parties to Proceeding in Court Below.....ii
Table of Contents.....iii
Table of Authorities.....iv
Opinions Below.....1
Jurisdiction.....2
Statutes Involved.....2
Statement of the Case.....7
Reasons the Writ Should Be Granted.....12
Conclusion.....19
Certificate of Service.....20
Appendix:

APPENDIX A - Opinion of the Court of Appeals entered on November 2, 1987.....A-1
APPENDIX B - Judgment of the Court of Appeals entered on December 14, 1987.....A-10
APPENDIX C - Order denying Petition for Rehearing entered on December 14, 1987.....A-12
APPENDIX D - Amended Judgment of the District Court entered on January 10, 1986.....A-13
APPENDIX E - Order of the District Court entered on December 24, 1985.....A-15
APPENDIX F - Order of the District Court entered on January 27, 1987.....A-17

TABLE OF AUTHORITIES

CASES: **Page**

Bennett v. City of Slidell, 728 F.2d 762 (5th Cir.) (en banc), *cert. denied*, 472 U.S. 1016, 105 S. Ct. 3476 (1984).....16

City of Oklahoma City v. Tuttle, 471 U.S. 808, 105 S. Ct. 2427 (1985).....13

Familias Unidas v. Briscoe, 619 F.2d 391 (5th Cir. 1980).....17

Hearn v. City of Gainesville, 688 F.2d 1328 (11th Cir. 1982).....18

Kentucky v. Graham, 473 U.S. 159, 105 S. Ct. 3099 (1985).....13

McKinley v. City of Eloy, 705 F.2d 1110 (9th Cir. 1983).....17

Monell v. Department of Social Services, 436 U.S. 658, 98 S. Ct. 2018 (1978).....12,13,15

Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473 (1961).....12

Murphy v. Mack, 358 So.2d 822 (Fla. 1978).....14

Parker v. Amerson, ___ So.2d ___, No. 86-430-CER (Ala. Dec. 11, 1987).....16,18

Pembaur v. City of Cincinnati, 475 U.S. 469, 106 S. Ct. 1292 (1986).....12,13,15

Van Ooteghem v. Gray, 774 F.2d 1332 (5th Cir. 1985).....17

Williams v. City of Valdosta, 689 F.2d 964 (11th Cir. 1982).....18

Statutes

29 U.S.C. §1254(1).....2

Civil Rights Act of 1871, 42 U.S.C. §1983.....passim

TABLE OF AUTHORITIES (continued)

Page

Section 30.07, Florida Statutes (1987).....4,10,14
Section 30.49, Subsections (1), (2)(a), (4) and (5), Florida Statutes (1987).....5,11
Section 30.53, Florida Statutes (1987).....4,10
Section 30.55(1), Florida Statutes (1985).....4

Other Authorities

Article IV, Section 7(a) of the Constitution of the State of Florida.....2,10,15
Article VII, Section 1(e) of the Constitution of the State of Florida.....3
Article VIII, Section 1(d) of the Constitution of the State of Florida.....3,9

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, St. Johns County, Florida, respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Eleventh Circuit entered in this action on November 2, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 831 F.2d 232, and is attached hereto as Appendix A. The Orders and Judgment of the United States District Court for the Middle District of Florida, Jacksonville Division, are not reported, and are attached hereto as Appendix D, E, and F, respectively.

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Eleventh Circuit was entered on November 2, 1987. A timely Petition for Rehearing was denied on December 14, 1987 (see Appendix C). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Civil Rights Act of 1871, 42 U.S.C. §1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Article IV, Section 7(a) of the Constitution of the State of Florida provides:

> (a) By executive order stating the grounds and filed with the secretary of state, the governor may suspend from office any state officer not subject to impeachment, any officer of the militia not in the active service of the United States, or any county officer, for malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform his official duties, or commission of a felony, and may fill the office by

> appointment for the period of suspension. The suspended officer may at any time before removal be reinstated by the governor.

Article VIII, Section 1(b) of the Constitution of the State of Florida provides:

> COUNTY OFFICERS. There shall be elected by the electors of each county, for terms of four years, a sheriff, a tax collector, a property appraiser, a supervisor of elections, and a clerk of the circuit court; except, when provided by county charter or special law approved by vote of the electors of the county, any county officer may be chosen in another manner therein specified, or any county office may be abolished when all the duties of the office prescribed by general law are transferred to another office. When not otherwise provided by county charter or special law approved by vote of the electors, the clerk of the circuit court shall be ex officio clerk of the board of county commissioners, auditor, recorder and custodian of all county funds.

Article VII, Section 1(e) of the Constitution of the State of Florida provides:

> COMMISSIONERS. Except when otherwise provided by county charter, the governing body of each county shall be a board of county commissioners composed of five or seven members serving staggered terms of four years. After each decennial census the board of county commissioners shall divide the county into districts of contiguous territory as nearly equal in population as practicable. One commissioner residing in each district shall be elected as provided by law.

Section 30.07, Florida Statutes (1987) provides:

> DEPUTY SHERIFFS. - Sheriffs may appoint deputies to act under them who shall have the same power as the sheriff appointing them, and for the neglect and default of whom in the execution of their office the sheriff shall be responsible.

Section 30.53, Florida Statutes (1987) provides:

> INDEPENDENCE OF CONSTITUTIONAL OFFICIALS. - The independence of the sheriffs shall be preserved concerning the purchase of supplies and equipment, selection of personnel, and the hiring, firing, and setting of salaries of such personnel; provided that nothing herein contained shall restrict the establishment or operation of any civil service system or civil service board created pursuant to s.14, Art. III, of the Constitution of Florida, provided, further that nothing contained in ss.30.48—30.53 shall be construed to alter, modify or change in any manner any civil service system or board, state or local now in existence or hereafter established.

Section 30.55(1), Florida Statutes (1985), which since this action has been repealed provided:

> LIABILITY INSURANCE. - The sheriffs of the counties are hereby authorized in their discretion to secure and provide for insurance to cover liability for damages arising out of claims for false arrests, false imprisonment, false or improper service of process or other claims growing out of the performance of the duties of the sheriffs or their deputies, or their employees, and to pay premiums therefore from the funds appropriated and made available for the necessary and regular expenses of the offices without the

necessity of specific appropriation or specification of expenses with respect thereto.

Section 30.49, subsections (1), (2)(a), (4), and (5), Florida Statutes (1987) provide:

> BUDGETS. - (1) Pursuant to s.129.03(2), each sheriff shall certify to the board of county commissioners a proposed budget of expenditures for the carrying out of the powers, duties, and operations of his office for the ensuing fiscal year of the county. The fiscal year of the sheriff shall henceforth commence on October 1 and end on September 30 of each year.
>
> (2)(a). The sheriff shall submit with the proposed budget his sworn certificate, stating that the proposed expeditures are reasonable and necessary for the proper and efficient operation of the office for the ensuing year. Each proposed budget shall show the estimated amounts of all proposed expeditures for operating and equipping the sheriff's office and jail other than construction, repair, or capital improvement of county buildings during such fiscal year. The expenditures shall be itemized as follows:
>
> 1. Salary of the sheriff.
> 2. Salaries of deputies and assistants.
> 3. Expenses, other than salaries.
> 4. Equipment.
> 5. Investigations.
> 6. Reserve for contingencies.
>
> . . . .
>
> (4) The board of county commissioners or the budget commission, as the case may be, may require the sheriff to correct mathematical,

mechanical, factual, and clerical errors and errors as to form in the proposed budget. At the hearings held pursuant to s.200.065, the board or commission, as the case may be, may amend, modify, increase, or reduce any or all items of expenditure in the proposed budget and shall approve such budget, as amended, modified, increased, or reduced. It must give written notice of its action to the sheriff and specify in such notice the specific items amended, modified, increased, or reduced. The budget shall include the salaries and expenses of the sheriff's office, costs of operation of the county jail, purchase, maintenance and operation of equipment, including patrol cars, radio systems, transporting prisoners, court duties, and all other salaries, expenses, equipment and investigation expenditures of the entire sheriff's office for the previous year. The sheriff, within 30 days after receiving written notice of such action by the board or commission, either in person or in his office, may file an appeal to the Administration Commission. Such appeal shall be by petition to the Administration Commission. The petition shall set forth the budget proposed by the sheriff, in the form and manner prescribed by the Executive Office of the Governor and approved by the Administration Commission, and the budget as approved by the board of county commissioners or the budget commission, as the case may be, and shall contain the reasons or grounds for the appeal. Such petition shall be filed with the Executive Office of the Governor, and a copy of the petition shall be served upon the board or commission from the decision of which appeal is taken by delivering the same to the chairman or president thereof or to the clerk of the circuit court. The board of county commissioners or the budget commission, as the case may be, shall have 5 days from delivery of a copy

of any such petition to file with the Executive Office of the Governor a reply thereto, and it shall deliver a copy of such reply to the sheriff.

(5) Upon receipt of the petition, the Executive Office of the Governor shall provide for a budget hearing at which the matters presented in the petition and the reply shall be considered. A report of the findings and recommendations of the Executive Office of the Governor thereon shall be promptly submitted to the Administration Commission, which, within 30 days, shall either approve the action of the board or commission as to each separate item, or approve the budget as proposed by the sheriff as to each separate item, or amend or modify the budget as to each separate item within the limits of the proposed board of expenditures and the expenditures as approved by the board of county commissioners or the budget commission, as the case may be. The budget as approved, amended, or modified by the Administration Commission shall be final.

STATEMENT OF THE CASE

On May 8, 1984, Sylvester Lucas, plaintiff below, was discharged from his position as a deputy sheriff for the St. Johns County Sheriff's Office in St. Johns County, Florida. This action was taken by Francis O'Loughlin, a defendant below, who then was sheriff of St. Johns County. O'Loughlin subsequently was defeated in his bid for reelection by Neil Perry, who presently is the elected sheriff of St. Johns County.

Lucas, in August of 1984, instituted an action pursuant to the Civil Rights Act of 1871, 42 U.S.C. §1983[1]

[1] Lucas also alleged two conspiracy counts pursuant to 42 U.S.C. §1985(2) and (3). However, these counts were dismissed below and are not pertinent to this appeal.

against O'Loughlin, in his official and individual capacities as former sheriff of St. Johns County, Ronald Janson, in his official and individual capacities as a former captain in the St. Johns County Sheriff's Office, and St. Johns County, Florida, through its Board of County Commissioners. The Complaint alleged various constitutional violations, including an allegation that Lucas' dismissal by the Sheriff violated his right to free speech protected by the First Amendment.

The action proceeded to a jury trial in August of 1985, before the United States District Court for the Middle District of Florida, Jacksonville Division. During the early stages of the trial, the District Court entered summary judgment in favor of the County when it became clear that Lucas was relying exclusively on the argument that the County was per se liable under 42 U.S.C. §1983 for the actions of the Sheriff. The case then went to the jury on the First Amendment claim against former Sheriff O'Loughlin[2]. The jury entered a verdict in favor of Lucas on the First Amendment claim, awarding him $17,100.00 in back pay and $1,000.00 compensatory damages for embarrassment and humiliation.

At the trial, the evidence revealed that in the spring of 1984, the State Attorney's Office (the state prosecutor) began an investigation into various allegations of impropriety at the St. Johns County Jail, including possible food theft. On March 2, 1984, Lucas was subpoenaed to testify before an Assistant State Attorney with respect to the allegations. At this time, Lucas provided the State Attorney with a copy of a prior written report he had prepared

[2] The District Court entered a directed verdict in favor of defendant Janson. In addition, all claims except the First Amendment claim were dismissed prior to the case going to the jury (including Lucas' procedural and substantive due process claims, liberty interest claim, and conspiracy claims). None of these dismissals is pertinent to this appeal.

concerning allegations of possible food theft at the jail.

On April 11, 1984, Lucas was called to a meeting at the Sheriff's office. Present were Sheriff O'Loughlin, Captain Janson, Captain Ned Hafner, Lieutenant Robert Porter, and Lucas. It is undisputed that no member of the St. Johns County Board of County Commissioners or other county official was present at this meeting. At this meeting there was discussion of Lucas' prior investigation of alleged food theft, as well as his previously having been subpoenaed by the State Attorney. O'Loughlin was very upset that Lucas had not reported to him about his investigation. Lucas then retrieved a copy of his written report, which had never been provided to the Sheriff. When O'Loughlin read an editorial comment that Lucas had placed at the end of his report that "file then close [sic], records retained. Obviously, top management had no interest", there was testimony that O'Loughlin stated "Luke, you're talking about me and you just tore your ass."[3]

Approximately two days later, on April 12, 1984, Lucas received a written letter of suspension, suspending him for dereliction of duty and failure to properly notify his superiors. His appointment as deputy sheriff subsequently was terminated for the same reason by a letter from Sheriff O'Loughlin dated May 8, 1984. It is undisputed that no member of the St. Johns County Board of County Commissioners or other county official participated in, ratified, or was involved in any way with the Sheriff's decision to terminate Lucas' appointment.

In the State of Florida, as in many states, the sheriff is a common law and independent constitutional officer, elected by the people. Fla. Const., Art. VIII, Sec. 1(d).

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[3] Captain Hafner testified that O'Loughlin stated "you bought the farm on that."

Although the sheriff in one sense is a county officer, he also represents the executive power of the state within his county. The Florida Legislature has conferred upon the sheriff the power to appoint deputies to serve under him, who "shall have the same power as the sheriff appointing them . . . ." Section 30.07, Fla. Stat. (1987). Florida law also gives the sheriff complete independence from the board of county commissioners concerning the selection of personnel, and the hiring, firing, and setting of salaries of such personnel. The sheriff is the final authority with regard to employment decisions within the sheriff's office, and is thus independent of the board of county commissioners, and all other county and municipal authority, in this area. Section 30.53, Fla. Stat. (1987). The sheriff's authority with respect to the selection of his deputies is derived not from any act of delegation on the part of the board of county commissioners, but rather is derived from state law, and by virtue of his status as an independent constitutional officer. Section 30.53, Fla. Stat. (1987). The board of county commissioners plays no role in the sheriff's employment decisions, particularly in the selection of deputies and has no power under state law to reverse an employment decision made by the sheriff, even if the board believes that the employment decision is improper or illegal. Nor does the board have the power to remove the sheriff from office, since the Florida Constitution has placed this power exclusively in the hands of the Governor. Fla. Const., Art. IV, Sec. 7(a).

The sheriff has no independent taxing power, and operating funds for the sheriff's office must be provided in part from county revenues. However, the board of county commissioners exercises no final control over the sheriff's budget. The sheriff, under Florida law, must submit a yearly budget proposal to the board of county commissioners, which is broken down into six general lump sum

categories[4]. The board is required to hold public hearings on the sheriff's budget proposal, at which time it may amend, modify, increase, or reduce any or all of the six lump sum categories. Section 30.49, Fla. Stat. (1987). However, the county does not have the final say with respect to the sheriff's budget, since any decision by the board may be appealed by the sheriff to the Governor. Decisions on the sheriff's budget by the Governor, through the State Administration Commission (which holds a separate budget hearing), are final. Section 30.49(5), Fla. Stat. (1987).

Lucas appealed the District Court's summary judgment in favor of the County[5]. The Eleventh Circuit reversed, holding that because the sheriff had "absolute authority over the appointment and control of his deputies", the act of the sheriff "was the act of St. Johns County." 831 F.2d at 235. In reaching this conclusion the Court of Appeals found that the sheriff was a policy-making official within the meaning of *Monell v. Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018 (1978), by virtue of the power afforded him under Florida law in the appointment and control of his deputies. There was no discussion by the Court of Appeals as to the source of the sheriff's power. Particularly, there was no finding that the act of the sheriff bound the County because of any act of delegation on the part of the St. Johns County Board of County Commissioners, because the selection of deputies was not a matter under Florida law which the Board had the authority to delegate.

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[4] The lump sum categories which must be included in the sheriff's budget are: (1) salary of the sheriff; (2) aggregate salaries of deputies and assistants; (3) aggregate expenses other than salaries; (4) equipment; (5) investigations; and (6) reserve for contingencies. Section 30.49 (2)(a), Fla. Stat. (1987).

[5] Lucas also appealed the District Court's denial of reinstatement and award of attorneys' fees to the County, neither of which is pertinent to this appeal.

The County filed a timely Petition for Rehearing. On December 14, 1987, the Court of Appeals denied the County's Petition.

REASONS THE WRIT SHOULD BE GRANTED

I. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS IN *PEMBAUR V. CITY OF CINCINNATI,* 475 U.S. 469, 106 S.CT. 1292 (1986), and *MONELL V. DEPARTMENT OF SOCIAL SERVICES,* 436 U.S. 658, 98 S.CT. 2018 (1978), THAT A MUNICIPALITY CANNOT BE HELD LIABLE UNDER 42 U.S.C. § 1983 ON A THEORY OF RESPONDEAT SUPERIOR.

In *Monell v. Department of Social Services,* 436 U.S. 658, 98 S. Ct. 2018 (1978), which overruled *Monroe v. Pape,* 365 U.S. 167, 81 S. Ct. 473 (1961), and held that local government units were considered "persons" and thus could be sued directly under 42 U.S.C. § 1983, this Court made it clear that a local governing body could not be held vicariously liable under Section 1983 on a *respondeat superior* theory. There had to be a showing that the constitutional violation in question specifically was caused by an official policy or custom of the governing body being sued. 436 U.S. at 691-92, 98 S. Ct. at 2036. This Court concluded in *Monell* that:

> . . . a local government may not be sued under Section 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that government as an entity is responsible under Section 1983. 436 U.S. at 694, 98 S. Ct. at 2037-38.

This Court has reiterated on several occasions the *Monell* requirement that the official policy in question have actually caused the constitutional tort as a precondition to Section 1983 liability. In *Kentucky v. Graham*, 473 U.S. 159, 105 S. Ct. 3099 (1985), this Court stated that a governmental entity's policy or custom "must have played a part in the violation of federal law." 473 U.S. at 166, 105 S. Ct. at 3106. In *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S. Ct. 2427 (1985), it was concluded that "[a]t the very least there must be an affirmative link between the policy and the particular constitutional violation alleged." 471 U.S. at 823, 105 S. Ct. 2436. Most recently, in *Pembaur v. City of Cincinnati*, 475 U.S. 469, ____, 106 S. Ct. 1292, 1297 (1986), this Court stated that "*Monell* is a case about responsibility." *Pembaur* concluded:

> The "official policy" requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible . . . that is, acts which the municipality has officially sanctioned or ordered. 475 U.S. at ____, 106 S. Ct. at 1298 (emphasis in original).

Under *Monell* and *Pembaur*, there are two basic ways in which a local governing body can be held liable under Section 1983. One, of course is for the body itself to take some official action which is held to be unconstitutional. Secondly, a local governing body can be held liable if it delegates its policymaking authority to an official whose action in carrying out this authority may then be "said to represent official policy" under *Monell*. 436 U.S. at 694, 98 S. Ct. at 2037-38. As this Court explained in *Pembaur*:

> Thus, for example, the county Sheriff may have discretion to hire and fire employees without also being the county official responsible for

> establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the sheriff *is* the official policymaker, *would* give rise to municipal liability. Instead, if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board. However, if the Board delegated its power to establish final employment policy to the Sheriff, the Sheriff's decisions *would* represent county policy and could give rise to municipal liability. 475 U.S. at ____, n.12, 106 S. Ct. at 1300 n.12. (emphasis in original).

In the present action, it is undisputed that the St. Johns County Board of County Commissioners took no official action which resulted in the unconstitutional discharge of Sylvester Lucas. The Board held no hearing on the discharge, did not ratify the Sheriff's action, and did not pass any ordinance relating to employment that was utilized by the Sheriff. It is also undisputed that the Board of County Commissioners never delegated any policy-making authority to the Sheriff which resulted in Lucas' discharge, since the selection or retention of deputies was not a matter which the Board had the authority to delegate under Florida law. Rather, the Sheriff derived his authority directly from state law, particularly Sections 30.07 and 30.53, Fla. Stat. (1987), which conferred upon the Sheriff total independence and discretion in this area. Indeed, the Florida Supreme Court, in *Murphy v. Mack*, 358 So.2d 822 (Fla. 1978), recognized that the sheriff, as an independent constitutional officer, was a sufficiently distinct political

entity to fall within the definition of "public employer" for purposes of Florida's public sector bargaining law, the Public Employees Relations Act, as amended, Chapter 447, Part II, Fla. Stat. (1987).

The Court of Appeals relied upon the Sheriff's final authority in the retention of deputies under state law in concluding that the Sheriff possessed "final authority to establish municipal policy" under *Monell* and *Pembaur*. 475 U.S. at ____, 106 S. Ct. at 1299. However, the Court of Appeals considered only whether the Sheriff's authority was final, and gave no consideration to the *source* of the Sheriff's authority. It is here where Petitioner St. Johns County respectfully submits that the Court of Appeals ran afoul of *Monell* and *Pembaur*. Without a specific showing that the Sheriff derived his authority to discharge Lucas through some act of delegation on behalf of the Board of County Commissioners, and in that sense, "caused" the constitutional tort, there should not have been any basis for Section 1983 liability on the part of the County.

The opinion of the Court of Appeals did not address the issue of causation and concluded in blanket fashion that the act of the Sheriff "was the act of St. Johns County." 831 F.2d at 235. The result, in effect, is the imposition of strict liability on the County with respect to a decision over which the Board of County Commissioners had no authority or control. Even if the Board had vehemently disagreed with Sheriff O'Loughlin's decision in discharging Lucas, it had no authority under state law to reverse the Sheriff's decision. Nor did the Board have the authority to suspend or remove the Sheriff from office if it felt he was acting improperly or illegally, since the Florida Constitution confers this authority only upon the Governor. Fla Const., Art. IV, Section 7 (a).

The decision below represents an unwarranted quantum leap in the scope of municipal liability under Section

1983. If not reversed by this Court, the limited public coffers of numerous counties and municipalities no doubt will be seriously drained by the defense of countless civil rights actions contesting the employment decisions of sheriffs and other independently elected officials, where the county or municipality played no part whatsoever in the alleged wrongful act.

II. THE ELEVENTH CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH THE STANDARD OF MUNICIPAL LIABILITY UTILIZED BY THE FIFTH AND NINTH CIRCUITS, AND IS ALSO IN CONFLICT WITH THE RECENT DECISION OF THE ALABAMA SUPREME COURT IN *PARKER V. AMERSON*.

The circuits have not been uniform in defining the difficult contours of municipal liability under Section 1983. However, no circuit has adopted a rule of liability as far reaching as the blanket "final authority" rule adopted by the Eleventh Circuit in this case.

The Eleventh Circuit's decision is in direct conflict with the standard of liability adopted for Section 1983 actions by the Fifth Circuit in *Bennett v. City of Slidell*, 728 F.2d 762 (5th Cir.)(en banc), *cert. denied*, 472 U.S. 1016, 105 S. Ct. 3476 (1984). In *Bennett*, the court specifically found that it was not enough to establish Section 1983 liability by a policy-making official, to simply establish that the official had "final authority" over the decision in question. There also had to be a specific showing connecting the policy in question to the governing body of the municipality being sued. The Fifth Circuit concluded:

> Liability must rest on official policy, meaning the city government's policy and not the policy of an individual official. The policy is that of the city, however, where it is made by an official under

> authority to do so *given by the governing authority*. Hence, culpable policy is attributable to the governing body of the city where the policy was made by an official to whom *the governing body* had given policy-making authority. 728 F.2d at 769 (emphasis added).

With respect to the requirement that there be an act of delegation on the part of the municipality, the court concluded:

> The governing body may delegate policymaking authority in either of two ways. It may delegate policymaking power by an express statement, by a job description or by other formal action. Or it may, by its conduct or practice, encourage or acknowledge the agent in a policymaking role. In either case, the delegation of policymaking authority *requires more than showing of mere discretion or decision making authority on the part of the delegee*. 728 F.2d at 769 (emphasis added).

See also *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980) (county held not liable under Section 1983 for the act of a Texas county judge where the judge was found to be effectuating state policy rather than county policy); *cf. Van Ooteghem v. Gray*, 774 F.2d 1332 (5th Cir. 1985).

The Ninth Circuit also has required a specific showing that a municipality delegate policy-making authority to impose Section 1983 liability. In *McKinley v. City of Eloy*, 705 F.2d 1110 (9th Cir. 1983), the Ninth Circuit affirmed a finding of Section 1983 liability against a municipality where its city manager was found to have discharged an employee in violation of the First Amendment. The city was held responsible for the unconstitutional firing because its city council specifically had delegated to its city

manager the ultimate responsibility for personnel decisions. 705 F.2d at 1116.

Even prior decisions of the Eleventh Circuit appear to have required a specific act of delegation in order to establish municipal liability, especially in the employment setting. In *Williams v. City of Valdosta*, 689 F.2d 964 (11th Cir. 1982), the court found that the city was liable under Section 1983 for the action of its city manager in demoting one of the city's firefighters. However, the court based its conclusion on a finding that the city manager specifically had been delegated final authority in demotion decisions by the city council. Similarly, in *Hearn v. City of Gainesville*, 688 F.2d 1328 (11th Cir. 1982), the Eleventh Circuit reversed a finding of Section 1983 liability against the city because there was no showing that authority for the city official's actions (in laying off the plaintiff) had been delegated to him by the city's governing body.

Finally, the Eleventh Circuit's decision below is in direct conflict with a decision recently handed down by the Supreme Court of Alabama in *Parker v. Amerson*, ___ So.2d ___, No. 86-430-CER (Ala. Dec. 11, 1987). In *Parker*, the Alabama Court, on a question certified by the Eleventh Circuit, Specifically held that an Alabama sheriff was not an employee of an Alabama county for purposes of imposing liability on the county under a respondeat superior theory.

Guidance is needed from this Court to resolve the conflicts described above. It is particularly important that this Court clarify the contours of municipal liability under 42 U.S.C. § 1983 in cases involving an alleged "policy-making official", where, as here, the policy-making official

derives his authority from state law and not from any act of delegation on the part of the municipaiity.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioner St. Johns County, Florida respectfully requests that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

CORBIN & DICKINSON
Post Office Box 41566
Jacksonville, Florida
(904) 356-8073

By: _____
Peter Reed Corbin

By: _____
John E. Duvall

Attorneys for Petitioner,
St. Johns County, Florida.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the foregoing Petition for Writ of Certiorari have been served this 11th day of March, 1988 by first class United States mail upon the following:

William J. Sheppard, Esquire
Courtney Johnson, Esquire
215 Washington Street
Jacksonville, Florida 32202

Gayle Smith Swedmark, Esquire
Parker, Skelding, Costigan,
McVoy & Labasky
Post Office Box 669
Tallahassee, Florida 32302-0669

_____
Attorney

APPENDIX A

Sylvester LUCAS, Plaintiff-Appellant,

v.

Francis O'LOUGHLIN, individually and in his official capacity as Sheriff of St. Johns County; Ronald Janson, individually and in his official capacity as Captain of Auxiliary Services for the St. Johns County Sheriff's Office; St. Johns County, Florida, Defendants-Appellees.

Nos. 86-3347, 87-3153.

United States Court of Appeals,
Eleventh Circuit.
Nov. 2, 1987.

County deputy sheriff brought § 1983 action against sheriff, county and others in connection with termination of his employment. The United States District Court for the Middle District of Florida, No. 84-1016-CIV J-16, John H. Moore, II, J., dismissed complaint against county and entered judgment in favor of deputy for money damages, but denied deputy's motion for reinstatement and incidental back pay. The court subsequently granted county's motion for attorney fees and costs against deputy. Deputy appealed. The Court of Appeals, Tuttle, Senior Circuit Judge, held that: (1) county was liable for acts of sheriff; (2) county was not entitled to § 1988 attorney fees and costs; and (3) deputy was not entitled to reinstatement.

Affirmed in part and reversed in part.

Appeal from the United States District Court for the Middle District of Florida.

Before TJOFLAT and KRAVITCH, Circuit Judges, and TUTTLE, Senior Circuit Judge.

TUTTLE, Senior Circuit Judge:

These are two appeals by the plaintiff below, Sylvester Lucas, from two judgments of the trial court of which he complains. The two appeals have been consolidated.

I. STATEMENT OF THE CASE

Lucas, who was at that time deputy sheriff of St. Johns County, Florida, was terminated by O'Loughlin, the sheriff, on grounds that the jury below found violated Lucas' First Amendment rights. During the course of the trial, the trial court dismissed Lucas' complaint against St. Johns County. The verdict favoring Lucas was for the total sum of $18,000, including back pay and embarrassment and humiliation. The petitioner then moved for further equitable relief, including reinstatement and incidental back pay. This motion was denied. Lucas then appealed from that judgment of the trial court as well as from the judgment dismissing the county as a defendant.

Therefore, the county moved for attorney's fees and costs against the plaintiff, claiming that it was entitled to attorney's fees under the principle announced by the Supreme Court in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 98, S.Ct. 694, 54 L.Ed.2d 648 (1978). The trial court awarded attorney's fees to the county in the amount of $10,000 and costs in the amount of $1177.09. The plaintiff then appealed from that judgment.

II. THE ISSUES

1. Under *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), is a county liable for the acts of a county official who is separately elected under the state constitution and laws but who has absolute final authority to carry out the acts such as those complained of?

2. Assuming that the trial court was correct in dismissing the action against the county, was the county entitled to attorney's fees under Title 42, § 1988 and on the theory announced by the Supreme Court in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978)?

3. Did the court err in not granting the plaintiff reinstatement to his position as deputy sheriff when a new sheriff had been elected after the termination complained of and where the statutes authorized the sheriff to name such deputies as he saw fit?

III. DISCUSSION

[1] A. On the issue of county liability, the parties both rely on the Supreme Court decision in *Monell*. The only language in that opinion dealing with the issue before us is as follows:

> We conclude therefore that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers *or by those whose edicts or acts may fairly be said*

> *to represent official policy,* inflicts the injury that the government as an entity is responsible under § 1983.

436 U.S. at 694, 98 S.Ct. at 2037 (emphasis added.)

The appellant here contends that since it is undisputed that the sheriff of St. Johns County has absolute and unfettered authority over the appointment, retention, rate of pay and acts of his deputies under the state law whatever acts the sheriff may carry out necessarily represent the "official policy" of St. Johns County as to the challenged conduct. The county, on the other hand, contends that St. Johns County, having nothing to do with the appointment or selection of the sheriff, who, instead, under state law, is elected by the people of the county to carry out his functions as sheriff, he is entirely independent of the county and the county is in no way responsible for any of his actions.

There can be no dispute about the fact that O'Loughlin was sheriff of St. Johns County and he carried out whatever functions the state law provided for a sheriff to do within the territorial confines of St. Johns County.[1] His salary and that of his deputies were paid out of county

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[1] Section 30.53, Fla.Stat. (1985) provides in pertinent part as follows:

> The independence of the sheriffs shall be preserved concerning the purchase of supplies and equipment, selection of personel, and the hiring, firing, and setting of salaries of such personnel . . .

Section 30.07, Fla.Stat. (1985) provides with respect to the appointment of deputies as follows:

> *Deputy sheriffs.*—Sheriffs may appoint deputies to act under them who shall have the same power as the sheriff appointing them, and for the neglect and default of whom in the execution of their office the sheriff shall be responsible.

funds. These salaries and the expenses of his office, including the operation and maintenance of the jail, were budgeted each year by the sheriff and submitted to the board of county commissioners of St. Johns County.

In such situation, we note a decision of the United States Court of Appeals for the Fifth Circuit in *Familias Unidas v. Briscoc*, 619 F.2d 391 (5th Cir. 1980).[2] The Court in *Familias Unidas* dealt with a problem presented by the action of a county judge who, under the state law, holds absolute sway over the tasks or areas of responsibility entrusted to him by the state statute. The Court found that the action of the state judge upon which the plaintiff sought to bind the county was an act of the judge mandated by a state statute, rather than one of the functions normal to the operation of a county judge.[3] The plaintiff therefore, lost on his contention that the county should be liable. However, in discussing the question of county liability, the Court stated as follows:

> Because of the unique structure of county government in Texas, the judge—like other elected county officials, *such as the sheriff* and treasurer—holds virtually absolute sway *over the particular tasks or areas of responsibility entrusted to him by state statute* and is accountable to no one other than the votors for his conduct therein. *Id. at 347, E. Jones, J. Ericson, L.*

---

[2] *This case was decided prior to the close of business on September 30, 1981, and is binding precedent under Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981)(en banc).

3. The Act complained of was mandated by a state statute which required a county judge to issue an order requiring the disclosure of the names of the members of any organization connected with the boycott of county schools. The court thus held that the county judge was the responsible officer of the state instead of the county.

> Brown, & R. Trotter, Practicing Politics in Texas 205 (3d ed. 1977). *Thus, at least* in those areas in which he, alone, is the *final authority or ultimate repository of county power, his official conduct and decisions must necessarily be considered those of one "whose edicts or acts may fairly be said to represent official policy" for which the county may be held responsible under section 1983.*

619 F.2d 404 (emphasis added.)

While the language above in *Familias Unidas* may be considered as dictum, it has been accepted as binding in the subsequent Fifth Circuit opinion in *Van Ooteghem v. Gray*, 774 F.2d 1332 (5th Cir. 1985). In *Van Ootefhem*, the Court held that a county treasurer, who, under Texas law, as is true under Florida law, was by state law elected by the people of the county, nevertheless acted for the county in performing the functions for which he was elected. The Court stated:

> The first issue is whether Gray's actions in firing Van Ooteghem are more properly characterized as the effectuation of the policy of the state of Texas or as an effectuation of discretionary local duties in the administration of county government. We are persuaded that the county treasurer's decisions regarding termination of Van Ooteghem fall on the local not the state side of his duty: he was about the business of county government. . . .

774 F.2d at 1337.

We conclude that the same principle applies to this case. Although, elected by virtue of state law, he was elected to serve the county as sheriff. In that capacity, he

had absolute authority over the appointment and control of his deputies. His and their salaries were paid by local taxation and according to a budget approved by the county commissioners. We conclude, therefore, that his act was the act of St. Johns County. The trial court erred in dismissing the county as a defendant.

[2] B. Our decision that the dismissal of the county was error, of course, disposes of appellant's contention that he was improperly charged attorney's fees and costs. Under the circumstances the county was not a prevailing party. However, the additional burden that rests on a successful defendant to obtain a judgment of attorney's fees against a plaintiff under 42 U.S.C. § 1988 and as delineated in *Christiansburg, supra,* causes us to comment about the action of the trial court in this case. The court itself stated: "The law is screwed up in this area." The court also said: "Well, I'm pretty well convinced, but *I still think there is some confusion in the law in this area,* and there is no telling what the appellate court is going to do. . . ."

[3] It appears to us that if the trial court clearly recognized that the law with respect to county liability under the circumstances of this case was still confused, it would be improper to grant the county its attorney's fees under the *Christiansburg* doctrine. In that case, the Supreme Court established the standard:

> In sum, a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.

We do not say that the fact that the trial court's decision on this matter has been reversed is alone a basis for

holding the trial court erred in granting attorney's fees to the successful defendant. We base the decision that it was improper in this case on the fact that the trial court itself recognized that there was doubt about the correctness of its action in dismissing the complaint against the county.

[4] C. The appellant contends that the district court erred in denying him reinstatement to his former position of deputy sheriff. The parties agree that the proper legal standard in a wrongful discharge case is that a prevailing plaintiff is ordinarily entitled to reinstatement absent "unusual circumstances." *Donnellon v. Fruehauf Corp.*, 794 F.2d 598, 602 (11th Cir. 1986); and *Darnell v. City of Jasper*, 730 F.2d 653, 655 (11th Cir. 1984).

It is apparent from the decision of the trial court that it found such unusual circumstances to exist in the peculiar status of the sheriff and his deputies under the Florida law. The sheriff's term, and therefore the term of the deputy, expired while the litigation was proceeding, and a new sheriff had been elected.

Appellant claims that this fact is not an unusual circumstance sufficient to deny him the right to reinstatement, saying that he was entitled to be reinstated even if the new sheriff could fire him immediately, so long as such termination would not be an unconstitutional one. It seems, therefore, that appellant's contention for this relief was *de minimis*, for, under his argument, if he should be reinstated by the order of the court, the new sheriff could terminate him the same day on the ground that he preferred the person whom he had already appointed in Lucas' place.

We conclude that the trial court did not err in denying the plaintiff reinstatement to his position as deputy sheriff.

The judgment dismissing St. Johns County as a party defendant and the judgment granting St. Johns County attorney's fees and costs are REVERSED and the judgment denying reinstatement to the plaintiff is AFFIRMED.

APPENDIX B

United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

Nos. 86-3347 & 87-3153

D. C. Docket No. 84-1016

SYLVESTER LUCAS,

Plaintiff-Appellant,

versus

FRANCIS O'LOUGHLIN, individually and in his official capacity as Sheriff of St. Johns County; RONALD JANSON, individually and in his official capacity as Captain of Auxiliary Services for the St. Johns County Sheriff's office, St. Johns County, Florida,

Defendants-Appellees.

Appeals from the United States District Court for the Middle District of Florida

---

Before TJOFLAT and KRAVITCH, Circuit Judges, and TUTTLE, Senior Circuit Judge.

JUDGMENT

These causes came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court dismissing St. Johns County as a party defendant and the judgment granting St. Johns County attorney's fees and costs are REVERSED; and the

judgment denying reinstatement to the plaintiff is hereby, AFFIRMED;

It is further ordered that defendants-appellees pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

Entered: November 2, 1987
For the Court: Miguel J. Cortez, Clerk

By: /s/ David Malaud
Deputy Clerk

ISSUED AS MANDATE: DEC 28 1987

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 86-3347 & 87-3153

Filed
DEC 14 1987

SYLVESTER LUCAS,

Plaintiff-Appellant,

versus

FRANCIS O'LOUGHLIN, individually and in his official capacity as Sheriff of St. Johns County; RONALD JANSON, individually and in his official capacity as Captain of Auxiliary Services for the St. Johns County Sheriff's Office, St. Johns County, Florida,

Defendants-Appellees.

Appeals from the United States District Court for the Middle District of Florida

---

ON PETITION(S) FOR REHEARING
(December 14, 1987)

Before: TJOFLAT and KRAVITCH, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellee, St. Johns County is *denied*.

ENTERED FOR THE COURT:

/s/ illegible

United States Circuit Judge

APPENDIX D

United States District Court
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLLE DIVISION

Filed
JAN 10 1986

SYLVESTER LUCAS,
Plaintiff

V.

FRANCIS O'LOUGHLIN, etc., et al.,
Defendants.

AMENDED
JUDGMENT IN A CIVIL CASE

Case No. 84-1016-Civ-J-16

The following matters in the above-entitled case are before the Court for final disposition:

1. The Plaintiff's motion to dismiss Count 5 of his Complaint as to all defendants made in open court and granted at commencement of trial.

2. Defendants' motions for directed verdict made at the close of Plaintiff's case-in-chief and having been granted in its entirety as to Defendants JANSON and St. JOHNS COUNTY and granted on Count 6 as to Defendant O'LOUGHLIN.

3. The Jury Verdict returned for the Plaintiff against Defendant O'LOUGHLIN in the sum of $17,100,00 back pay and $1,000.00 embarrassment and humiliation.

In accordance with the Court's ruling in open court and the Verdict of the Jury herein, it is

ORDERED and ADJUDGED:

1. Count 5 of the Plaintiff's Complaint against Defendants O'LOUGHLIN, JANSON, and ST. JOHNS COUNTY, is DISMISSED with prejudice.

2. Count 6 of the Complaint against Defendant O'LOUGHLIN is DISMISSED with prejudice.

3. The Plaintiff shall take nothing on his Complaint against Defendants RONALD JANSON and ST. JOHNS COUNTY, that the action as to said Defendants is DISMISSED on the merits, and that Defendants JANSON and ST. JOHNS COUNTY recover of the Plaintiff, SYLVESTER LUCAS, their costs of action.

4. The Plaintiff shall recover of the Defendant FRANCIS O'LOUGHLIN, individually and in his official capacity as Sheriff of St. Johns County, the total sum of Eighteen Thousand, One Hundred Dollars ($18,100.00), with interest thereon at the legal rate as provided by law, and his costs of action.

DONE and ORDERED in Chambers at Jacksonville, Florida this 10 day of January, 1986, *nunc pro tunc* to December 23, 1985.

/s/ illegible
UNITED STATES DISTRICT JUDGE

Copies to:
All counsel of record

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLLE DIVISION

Filed
DEC 24 1985

SYLVESTER LUCAS,
Plaintiff,

vs. No.84-1016-Civ-J-16

FRANCIS O'LOUGHLIN, etc., et al.,
Defendants.

ORDER

This cause came before the Court at the hearing held on December 23, 1985 on Plaintiff's post-judgment motion for further equitable relief, filed September 3, 1985. For the reasons announced in open court, it is now

ORDERED and ADJUDGED:

1. That Plaintiff's motion for further equitable relief be and the same is hereby DENIED as to the prayer for reinstatement, and back pay and fringe benefits incident thereto.

2. That Plaintiff's motion be and the same is hereby GRANTED as to the prayer for the expungement of his employment record and for an award of attorney's fees and costs.

The current Sheriff of St. Johns County is hereby directed to delete all references to Plaintiff's suspension and termination from his position as jail administrator and the reasons therefore that may be contained in Plaintiff's employment record.

The parties are hereby directed to file with the Court on or before January 31, 1986 memoranda pertaining to the determination of the amount of attorney's fees to be awarded with the factors set forth in *Johnson v. Georgia Highway Express,* 488 F.2d 714 (5th Cir. 1974).

Plaintiff is hereby directed to file with the Clerk of this Court a bill of costs in accordance with Rule 54(d), *Federal Rules of Civil Procedure.*

By separate order, final judgment will be entered simultaneously herewith for the amount of damages awarded to Plaintiff pursuant to the jury verdict in this case.

DONE and ORDERED in Chambers at Jacksonville, Florida this 23 day of December, 1985.

/s/ illegible
UNITED STATES DISTRICT JUDGE

Copies to:

All counsel of record

APPENDIX F

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLLE DIVISION

Filed
JAN 27 1987

SYLVESTER LUCAS,
Plaintiff,

vs. No.84-1016-Civ-J-16

FRANCIS O'LOUGHLIN, etc., et al.,
Defendants.

ORDER

This cause is before the Court on the following motions: Plaintiff's Motion for Award of Costs and Attorney's Fees, filed January 31, 1986; and Defendant's, ST. JOHNS COUNTY, Motion for an Award of Attorney's Fees and Costs, filed June 13, 1986.

Plaintiff, as the prevailing party on his § 1983 claim, is entitled to an award of attorneys' fees. 42 U.S.C. § 1988. In determining the amount of attorneys' fees to be awarded, the Court shall evaluate the so-called *Johnson* factors." *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).

Initially, the Court must determine the lodestar amount. The Court finds that the hourly rates used by Plaintiff to calculate his requested fee award are reasonable. Although the Court does not dispute the number of hours spent by counsel for Plaintiff on this case,

the Court finds that the number of hours reasonably expanded by all attorneys and clerks in the prosecution of this case should not have exceeded 200 hours. Therefore, the Court concludes that the time and labor required in the prosecution of this case yields a lodestar amount of $19,166.25.

Plaintiff argues that consideration of some of the other Johnson factors should result in the enhancement of the fee award. The Court disagrees. Moreover, the Court notes that the Eleventh Circuit recently has held that the lodestar amount is presumed to be the reasonable fee, and an enhancement may be justified only in some cases of exceptional success. *Lattimore v. Oman Construction*, 795 F.2d 930, 931 (11th Cir. 1986). This is not a case of exceptional success. Plaintiff obtained somewhat less than relief.

The Court finds that the novelty and difficulty of the questions involved do not warrant an enhancement of the fee award. Further, while counsel for Plaintiff performed adequately, the skill requisite to perform the legal services properly does not justify an enhancement, nor does the experience, reputation and ability of counsel for Plaintiff. The Court also finds that the fact that the fee was contingent does not justify an enhancement because this was not a case of exceptional success. *Lattimore*, 795 F.2d at 933. Further, as already noted, the amount involved and the results obtained do not warrant any adjustment of the fee award. The parties and the Court agree that the remaining *Johnson* factors are neutral. Therefore, the Court concludes that a reasonable fee award to Plaintiff in this case should be $19,166.25.

Plaintiff also moves for an award of costs in the amount of $2,294.32. Since Defendant, FRANCIS O'LOUGHLIN, has not timely objected to Plaintiff's requested costs, the Court shall tax costs against Defendant,

FRANCIS O'LOUGHLIN, and in favor of Plaintiff in the amount of $2,294.32.

Defendant, ST. JOHNS COUNTY (the "County"), also moves for an award of attorneys' fees under 42 U.S.C. § 1988, arguing that as a prevailing defendant it is entitled to an award of attorneys' fees under the authority of *Christianburg Garment Co. v. EEOC*, 424 U.S. 412, 98 S.Ct. 694 (1978) and *Hughes v. Rowe*, 449 U.S. 5, 101 S.Ct. 173 (1980). The Court agrees and finds that Plaintiff's claims against the County were frivolous, unreasonable, groundless, and that Plaintiff continued to litigate them after they clearly became so. Plaintiff produced not one shred of evidence at trial to support any sort of conspiracy claim against the County. Indeed, the Court concludes that counsel for Plaintiff was unreasonable in waiting until the trial of this cause before abandoning his claims against the County, leading the Court to grant the County's motion for directed verdict at trial.

As for the amount of attorney's fees to be awarded to the County, the Court concludes that, although it does not dispute the number of hours spent by counsel for the County on this case, the number of hours reasonably expended in the defense of the claims against the County should not have exceeded 150 hours. The Court finds that the hourly rate of $125 used by the County to calculate its requested fee award is reasonable. Therefore, the Court concludes that the time and labor required by the County in the defense of this case yields a lodestar amount of $18,750.

The Court further finds that this lodestar figure should not be adjusted because of any of the *Johnson* factors. As acknowledged by the County in its memorandum in support of its motion for attorneys' fees, each of the *Johnson* factors is neutral and does not warrant the